IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-187

FIRST AMERICAN BANK & TRUST COMPANY, a Domestic Corporation, ROBERT M. HART, ROBERT N. CAMPBELL, LARRY SANDERS, HARVEY W. BOEN, ALBERT W. FETZER, RUTH M. HART, BERNARD H. HILLYER, ARNE J. SPRINGAN, JOHN F. SULLIVAN, CHARLES L. WELCH,
Petitioners,

vs.

G. W. ELLWEIN, State Examiner and Commissioner, Department of Banking and Financial Institutions; THE STATE BANKING BOARD and VICTOR ABRAHAM, Bank Examiner, All of the State of North Dakota,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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Petitioners,

vs.

G. W. ELLWEIN, State Examiner and Commissioner, Department of Banking and Financial Institutions; THE STATE BANKING BOARD and VICTOR ABRAHAM, Bank Examiner, All of the State of North Dakota,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

STATUTORY PROVISIONS INVOLVED

6-01-01, North Dakota Century Code

6-01-01. Management and control—State department of banking and financial institutions.—The state department of banking and financial institutions shall be under the supervision

of the state banking board and a chief officer designated as the commissioner of banking and financial institutions, and known as the state examiner. Whenever the term state examiner is used in this Code, it shall mean the commissioner of banking and financial institutions. The state department of banking and financial institutions shall have charge of the execution of all laws relating to state banks, savings banks, trust companies, building and loan associations, mutual investment corporations, mutual savings corporations, banking institutions and other financial corporations, exclusive of the Bank of North Dakota and all credit unions, organized or doing business under the laws of this state. The same power granted herein to the state department of banking and financial institutions with reference to the corporations named in this section shall be granted to the state credit union board with reference to credit unions.

6-01-08, North Dakota Century Code

6-01-08. Appointment of state examiner—Qualifications.— The state examiner shall be appointed by the governor and confirmed by the senate, and shall hold his office for a term of four years and until his successor has been appointed, confirmed by the senate, and has qualified, unless he is removed sooner as herein provided. His term of office shall commence on the first day of July in each year next following a national presidential election. The state examiner shall be a skilled accountant, and shall not be an incumbent of any other public office in the state, or in any county, municipality, or public institution thereof, and shall not own, hold, or control any stocks, capital, or bonds, or hold the office of trustee, assignee, officer, agent, or employee of any financial institution under his jurisdiction, or of any corporation engaged in the business of guarantying or insuring the fidelity or faithful performance of the duties or the solvency of public officers or of public depositaries. The

governor may remove from office any state examiner who violates or fails to discharge faithfully the duties of his office or who becomes disqualified under the provisions of this section.

6-03-41, North Dakota Century Code

6-03-41. Issuance of capital notes or debentures—Not subject to double liability.—With the approval of the state examiner, any bank institution, through action by its board of directors taken at any time and without requiring any action by its stockholders, may issue and sell its capital notes or debentures. All capital notes or debentures shall be subordinate and subject to the claims of depositors, and at the time of issue may be subordinated and subjected to the claims of other creditors, but in no case shall be subject to assessment. The holders of capital notes or debentures as such shall not be responsible individually for any debts, contracts, or engagements of the issuing institution.

Source: S. L. 1935, ch. 92, § 1; R. C. 1943, § 6-0341.

6-03-42, North Dakota Century Code

6-03-42. Capital notes or debentures included in capital—Retirement.—The term "capital" as used in this title shall embrace the amount of outstanding capital notes and debentures legally issued by any banking institution. The capital stock of a banking institution shall be unimpaired when the amount of such capital notes and debentures as represented by sound assets exceeds the impairment as found by the state examiner. The state examiner must approve of any retirement of any capital notes or debentures, and may require the bank to issue some other form of capital before retiring the capital notes or debentures.

Source: N.D.C.C.; S. L. 1969, ch. 109.

28-32-05, North Dakota Century Code

28-32-05. Rules of procedure—Complaint—Notice of hearing—Filing and service.—The following rules of procedures shall be observed by all administrative agencies in proceedings in which the same are applicable:

1. In all proceedings brought before an administrative agency having jurisdiction of the subject matter, the petitioner, or the administrative agency when acting upon its own initiative, shall prepare and file a clear and concise statement or complaint with the agency having jurisdiction of said proceeding. Said complaint shall contain a concise statement of the claims or charges upon which the petitioner relies, and the relief sought. Upon the filing of such complaint, the appropriate administrative agency shall issue a notice for hearing, which shall fix the time and place for trial thereof upon its merits. Said notice shall inform the party proceeded against that unless an answer to such complaint is served upon the petitioner and agency giving such notice at least three days before the time specified for hearing therein that the complaint will be deemed admitted, and that the agency will enter such order as the facts and law may warrant. A true copy of the complaint and notice of hearing shall be served upon the respondent personally, or by registered or certified mail, as the agency may direct, at least twenty days before the time specified for hearing thereof unless the service of such complaint or notice of hearing is waived, in writing, by the party proceeded against, or unless the parties agree upon a definite time and place for hearing thereof with the consent of the agency having jurisdiction. Provided, however, that in case of an

emergency the agency, in its discretion, may notice a proceeding for hearing upon the merits upon less than twenty days' notice. Every party to such proceeding shall be given a reasonable time within which to prepare for such hearing, which may be extended by the agency upon good cause being shown by the applicant therefor.

2. At such hearing, the person against whom the proceedings have been instituted shall be afforded the same opportunity to present evidence and to examine and cross-examine witnesses as is permitted to parties to an action in the district court.

28-32-18, North Dakota Century Code

28-32-18. Consideration of additional or excluded evidence.— If an application for leave to adduce additional evidence is made to the court in which an appeal from a determination of an administrative agency is pending, and it is shown to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing or proceeding had before the administrative agency, or that such evidence is material to the issues involved and was rejected or excluded by the agency, the court may order that such additional evidence be taken, heard, and considered by such agency on such terms and conditions as the court may deem proper. After considering such additional evidence, the administrative agency may amend or modify its findings of fact, conclusions of law, and decision, and shall file with the court a transcript of such additional evidence together with its new or modified findings of fact, conclusions of law, and decision, if any.

28-32-19, North Dakota Century Code

28-32-19. Scope of and procedure on appeal from determination of administrative agency.—The court shall try and hear an appeal from the determination of an administrative agency without a jury and the evidence considered by the court shall be confined to the record filed with the court. If additional testimony is taken by the administrative agency or if additional findings of fact, conclusions of law, or a new decision shall be filed pursuant to section 28-32-18, such evidence, findings, conclusions, and decision shall constitute a part of the record filed with the court. After such hearing, the court shall affirm the decision of the agency unless it shall find that such decision or determination is not in accordance with law, or that it is in violation of the constitutional rights of the appellant, or that any of the provisions of this chapter have not been complied with in the proceedings before the agency, or that the rules or procedure of the agency have not afforded the appellant a fair hearing, or that the findings of fact made by the agency are not supported by the evidence, or that the conclusions and decision of the agency are not supported by its findings of fact. If the decision of the agency is not affirmed by the court, it shall be modified or reversed, and the case shall be remanded to the agency for disposition in accordance with the decision of the court.

STATEMENT OF FACTS

The North Dakota State Banking Board, acting on its own initiative, § 28-32-05 N.D.C.C., filed a complaint against these Petitioners on or about May 26, 1972. A response entitled, "Special Appearance and Return", was filed by these Petitioners on or about June 15, 1972. On these pleadings, the State Banking Board held a hearing at the State Capitol in Bismarck,

North Dakota, June 19-29, and September 13-14, 1972. The Petitioners participated fully in the hearings. The transcript of the record consists of 5 volumes for a total of 1248 pages, and lasted 12 days. They conducted an exhaustive cross-examination of Respondent's witnesses, and called and conducted original examination of witnesses who were employees of the State Banking Department. In addition, the Petitioners offered in evidence, 55, more or less, documentary exhibits. Exhibit A through CCC. Record reference is found in the Transcript, Vol. I, pp. XII to XIV; Vol V, pp. IV to VI. All of these exhibits were received in evidence and became a part of the record. Finally, the hearing was reopened in September of 1972 at the insistence and request of Petitioner. R 992. Petitioner then conducted a long interrogation of Bank Examiners who had signed the Report of Examination. Exhibit 119. R 994, 997 et seq.

The State Banking Board on December 11, 1972, made 128 specific Findings of Fact and 78 Conclusions of Law. An order based upon these Findings and Conclusions was entered on the same day and a receiver was appointed to liquidate the bank. Appendix 1.

An appeal was taken by Petitioner to the State District Court. The order appointing the receiver was stayed. Under the applicable statute, the evidence considered by the District Court on appeal of an administrative agency is confined to the record made before the State Banking Board. § 28-32-19, N.D.C.C. Pursuant to statute, Petitioner moved the court for an order to remand the cause to the State Banking Board for the taking of additional evidence. § 28-32-18, N.D.C.C. Appendix 2. This statute requires a showing that the evidence is material and that there are reasonable grounds for failure to adduce such evidence at the hearing. After extensive argument, both written and oral, application was denied by order of the court dated February 29, 1973. Appendix 3.

We turn now to the so-called STATEMENT OF FACTS in the Petition for Certiorari.

1. Item 1 on Page 9 of the Petition states that the Examiner had "previously, orally approved" the capital notes. There is no record support for this assertion.

2. Item 2 on Page 10 of the Petition refers to newsstories and headlines. These are not part of the record.

3. Item 3 on Page 10 of the Petition—The matters described are not part of the record.

4. Item 5 on Page 10 of the Petition—The matters described are not part of the record.

5. Item 6 on Page 10 of the Petition—This, except for the statement that the State Examiner hired deputy examiners, CPA's, in a partnership in another city, is not included in the record.

6. Item 7 on Pages 10-11—This is not included in the record.

7. Item 8 on Page 11—This is not included in the record.

8. Item 9 on Page 11—This is not included in the record.

9. Item 10 on Page 11—This is not part of the record.

10. Item 11 on Page 11—This is not part of the record.

11. Item 12 on Page 11—This is not part of the record.

12. Item 13 on Page 11—This is not part of the record.

This was one of the grounds for the motion to remand to the State Banking Board. The District Court stated in effect that the Petitioners having knowledge, during the hearing, of the Affidavit of Earle H. Campbell, could not speculate the

result of the hearing and when the order of the Board was adverse, bring the Affidavits to the attention of the court on appeal. If, in fact, Petitioners had a complaint, it was made out of time.

13. Item 12 on Page 12—There is no support in the record for the statement, ". . . and directed in the same manner what and how certain assets could be used in the examination report so that they showed the FAB with a capital deficit." It may be that what is here referred to concerns capital notes. The fact is that the so-called capital notes were required by statute to be approved by the State Examiner. § 6-03-41, N.D.C.C., and the capital notes could not be included in the capital account unless they were legally issued. § 6-03-42, N.D.C.C. *First American Bank & Trust Company et al. v. G.W. Ellwein et al.* Appendix 1, Petition for Certiorari.

14. Item 15 on Page 12—These matters do not appear on the record.

15. Item 16 on Page 12—Most of these recitals are not part of the record. The matter was before the United States Court of Appeals for the 8th Circuit, the opinion of the court by Judge Van Pelt appears in *Securities and Exchange Commission v. First American Bank & Trust Company*, 481 F. 673 (8th Circuit 1973).

Reference has been made to Petitioner's motion, Appendix 2, to the District Court, to remand the cause to the Board for the taking of additional evidence. Respondent's brief to the District Court on the motion, summarized the evidence the movant wanted to place in the record. Appendix 4. As noted, the motion was denied. Appendix 3. Nevertheless, Petitioner included these matters in his Petition here. *See* Petitioner's Appendix 52, 59, 64, 66, and 68.

Inclusion in a brief of material not part of the record on appeal is improper and censorable. *U.S. v. Anderson*, 481 F.2d 685 (4th Circuit 1973).

REASONS WRIT SHOULD BE REFUSED

"1. Is the statutory scheme for the regulation of banking institutions, in North Dakota, constitutional?"

It is difficult to determine from the Petition what it is Petitioners object to. The State Department of Banking, under management of the State Examiner, and the State Banking Board, have charge of all laws relating to state banks and trust companies. § 6-01-01, N.D.C.C. The State Banking Board is composed of six members; the State Examiner, who "shall not own, hold, or control any stock in any banks, or hold any office in or be an employee of any bank or financial institution under his jurisdiction"; § 6-01-08, N.D.C.C.; three members who shall have had five years' experience in an executive capacity in the management of a state bank in the State of North Dakota; one member who shall have had at least five years' experience in an executive capacity in the management of any state or national bank in North Dakota, and one member who shall have had at least five years' experience in an executive capacity in the management of any state chartered, Building and Loan Association. The State Examiner is Chairman of the Board, and the Attorney General is ex-officio, the attorney for the Board. § 6-01-01, N.D.C.C.

This is, in general, consistent with the format for the oversight of state banking systems in many of the states. *See A Profile of State Chartered-Banking*, prepared by the Conference of State Bank Supervisors, 1015 18th Street N.W., Washington, D.C. (1973).

It would seem that without something more, there is nothing unconstitutional about having bankers or persons with banking experience regulate the banking industry. *North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc.*, — U.S. —, 38 L.Ed.2d 379, 94 S.Ct. (1973) (Pharmacists); *Gibson v. Berry-*

hill, 411 U.S. 564, 36 L.Ed.2d 488, 93 S.Ct. 1689 (1973) (Optometrists).

It would seem clear that if there are additional matters which would warrant a determination of unconstitutionality, a record showing of such circumstances is required. *Gibson v. Berryhill*, 411 U.S. 564, 36 L.Ed.2d 488, 93 S.Ct. 1689 (1973). Rules of S.Ct. of U.S., 15, 23, 40. *U.S. ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 98 L.Ed. 681, 74 S.Ct. 499 (1954).

"2. Did FAB receive a fair hearing, pursuant to 'due process of law', before said board?"

It seems from the Petition that the Petitioners base their claim on, among other things, some sort of improper combination of functions in the State Banking Board. In the first place, combining, investigating, and prosecuting functions in the same officer is not a violation of due process. *Marcello v. Bonds*, 349 U.S. 302, 75 L.Ed. 1107, 75 S.Ct. 757 (1955). The court has noted that the extent to which an administrative agency may investigate and act upon material facts and then sit as an adjudicative body, has occasioned some divergence of views among federal courts. *Gibson v. Berryhill*, 411 U.S. 564, 36 L.Ed.2d 488, 93 S.Ct. 1689 (1973). Second, Receiver Petitioner failed to prove by evidence in the record that in fact, there was such a prejudicial combination. *U.S. ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 98 L.Ed. 681, 74 S.Ct. 499 (1954). Here, the evidence is that there was a separation of functions in fact. The examination, while under the general supervision of the State Examiner, was made by bank examiners. These included staff examiners and independent certified public accountants especially appointed for the job. There was no evidence of record that the State Examiner participated in any way in this examination. The reports of examination (Ex-

hibits 1, 2, and 119; R 5-6; 994-995), are signed individually by the examiners. The testimony of the Examiners, during an extensive interrogation of the examiners by the Petitioners, disclosed that only the bank examiners participated in the examination. Once the report of examination was made, showing insolvency (Exhibit 1), § 6-07-03 N.D.C.C., the State Examiner made a statutory finding of insolvency and took possession of the Petitioner bank. § 6-07-04 N.D.C.C. This was reported to the State Banking Board.

Thereafter, pursuant to the Board's instruction to the State Examiner, the Attorney General, the Board's statutory counsel, § 6-01-01 N.D.C.C., represented by a Special Assistant Attorney General, initiated proceedings against the Petitioners. The Special Assistant Attorney General who did not participate at any bank examination, drafted the pleadings and in due course, presented the evidence to support the allegations of the pleadings. The Board considered the evidence and made its adjudication. There simply is no record showing of unlawful combination of functions.

On the subject of prejudgment, the mere fact that the Board approves the Report of Examination, certainly cannot be said to be prejudgment of the issues. The Board conducted a hearing to determine the solvency of First American Bank & Trust Company. The approval was nothing more than a statement of the need to hold a hearing. Further, the Board was discharging its statutory responsibilities.

"3. Does the 'Rule of Necessity' pertain when there is another tribunal or process available for remedy?"

Petitioners assert that the Rule of Necessity does not apply because § 6-05-29 N.D.C.C. authorized the Attorney General to institute proceedings against any corporation as the case may require.

Questions with respect to the Rule of Necessity do not arise until some showing of prejudice has been made. There is no recorded evidence of any prejudice on the part of the Board. The failure to adduce evidence which Petitioner claims might tend to show such prejudice, was Petitioner's own doing and was without legal justification. Further, it appears that such "evidence" is not a probative of prejudice.

There is no point in expanding on the opinion of the Supreme Court of North Dakota on the subject. *First American Bank & Trust Company et al. v. G. W. Ellwein et al.*, Appendix 1, et seq., Petition for Certiorari. *See also, The Federal Trade Commission v. Cement Institute*, 333 U.S. 683, 68 S.Ct. 793, 92 L.Ed. 1010 (1948).

THE JUSTICE'S SECRETARY

Finally, we do not understand Petitioner's complaint with respect to the Justice of the Supreme Court whose secretary was the wife of one of the Petitioners. The Petitioner has not been identified. Two things may be said. First, it should be explained how this fact could possibly prejudice the judge against the secretary's husband. We simply do not understand it, and it is not explained. Second, surely the unidentified Petitioner must have known where his wife worked, and surely he is charged with this knowledge. Here again, it seems that the parties decided to speculate the result and to register a complaint when the result was adverse.

CONCLUSION

There is no record showing of discriminatory prejudice, either in fact or in the statutory composition of the State Banking Board. On the contrary, the record is clear that there is, in fact, a separation of function in the State Banking Department.

Finally, Petitioners received a fair hearing before the State Banking Board. Complaints and objections to the conduct of the hearing when made, were out of time. There are no reasonable grounds for failure to adduce additional evidence; if there was such, at the hearing before the State Banking Board.

It is respectfully submitted that the Petition for Writ of Certiorari be denied.

Respectfully submitted

ALLEN I. OLSON
Attorney General of the State
of North Dakota
By: FRANK F. JESTRAB
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General of the State
of North Dakota

APPENDIX

APPENDIX A

State of North Dakota
State Banking Board

In the Matter of First American Bank & Trust Company, Robert M. Hart, Robert N. Campbell, Larry Sanders, Its Officers and Directors, Harvey W. Boen, Albert W. Fetzer, Ruth M. Hart, Bernard H. Hillyer, Arne J. Springan, John F. Sullivan, Charles L. Welch, its Directors,
Respondents.

Order Appointing Receiver

Upon the FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER, entered by the State Banking Board on Monday, December 11, 1972, and pursuant to the Judgment on Remittitur in the District Court of the State of North Dakota, in and for the County of Burleigh, in the following described action:

First American Bank & Trust Company, a domestic corporation, Robert M. Hart, Robert N. Campbell, Larry Sanders, Harvey W. Boen, Albert W. Fetzer, Ruth M. Hart, Bernard H. Hillyer, Arne J. Springan, John F. Sullivan, Charles L. Welch,
Plaintiffs and Respondents

v.

G. W. Ellwein, State Examiner and Commissioner, Department of Banking and Financial Institutions; the State Banking Board and Victor Abraham, Bank Examiner, all of the State of North Dakota,
Defendants and Appellants

being Civil Nos. 21567 and 21797 in the District Court of Burleigh County, and respectively, Civil No. 8747 and Civil No. 8815 in the Supreme Court of North Dakota, it is

ORDERED that HARRY GEORGE of Bismarck, North Dakota, be and he hereby is appointed Receiver of First American Bank & Trust Company of Bismarck, North Dakota, and upon his qualification as provided by law, he is hereby authorized and directed to collect all monies due to the said First American Bank & Trust Company and to do such other acts as are necessary to conserve its business and assets and he shall proceed to liquidate the affairs thereof in the manner provided by law, it is further

ORDERED that First American Bank & Trust Company, Robert M. Hart, Robert N. Campbell, Larry Sanders, Harvey W. Boen, Albert W. Fetzer, Ruth M. Hart, Bernard H. Hillyer, Arne J. Springan, John F. Sullivan, Charles L. Welch, their servants, agents, employees and attorneys, be and hereby are, enjoined and restrained from interfering in any manner with the property and assets of said First American Bank & Trust Company, or the conduct of the Receiver as herein directed, and they and each of them be and hereby are directed to transfer and turn over to the said Receiver, all books of account, property, assets and records of First American Bank & Trust Company, remaining in their possession, and it is further

ORDERED that the order of G. W. Ellwein, Commissioner, Department of Banking and Financial Institutions, dated June 28, 1971, putting Victor Abraham, Bank Examiner of the State of North Dakota, in possession of the books, records and other property of First American Bank & Trust Company, which order was enforced by the ORDER FOR PUNISHMENT AND WARRANT OF COMMITMENT, entered in Civil No. 21567 and Civil No. 21797, June 8, 1972, as hereinabove set forth,

be and hereby is suspended insofar, and only insofar, as this order remains in full force and effect.

Dated this 11th day of December, 1972.

/s/ G. W. ELLWEIN
G. W. ELLWEIN

/s/ RALPH L. TROM
RALPH L. TROM

/s/ W. S. RAYMOND
W. S. RAYMOND

/s/ JOHN ROUZIE
JOHN ROUZIE

/s/ JAMES H. DUNCAN
JAMES H. DUNCAN

/s/ DONALD T. NICKLAWSKY
DONALD T. NICKLAWSKY
State Banking Board

APPENDIX B

In District Court
Fourth Judicial District

State of North Dakota
County of Burleigh

First American Bank & Trust Company, a domestic corporation, Robert M. Hart, Robert N. Campbell, Larry Sanders, Harvey W. Boen, Albert W. Fetzer, Ruth M. Hart, Bernard H. Hillyer, Arne J. Springan, John F. Sullivan, Charles L. Welch,

Appellants,

vs.

G. W. Ellwein, State Examiner and Commissioner, Department of Banking and Financial Institutions; the State Banking Board and Victor Abraham, Bank Examiner, all of the State of North Dakota,

Respondents.

Civil No. 22281

Motion

Appellants in the above entitled action move the Court as follows:

1. For an injunction, pursuant to 32-06 of the North Dakota Century Code, to permanently enjoin the State Banking

Board, as presently composed and constituted, from continuing in any manner or form whatsoever in its quest to have a receiver appointed to liquidate the assets and dissolve the business affairs of Appellants, on the grounds and for the reasons:

a. That the members of the Board are competitors of the Appellants in the financial business in North Dakota, with adverse interests.

b. That members of the Board are defendants in a prior legal action commenced against them wherein Appellants are Plaintiffs;

c. That members of the Board have pre-judged the Appellants prior to their purported Findings of Fact, Conclusions of Law, and Order for the Appointment of a Receiver;

d. That the Respondents are biased and prejudiced against the Appellants;

e. That all members of the Board did not participate in the hearing and determination of the Board;

f. That during the hearing members of the Board discussed the case with persons not called as witnesses;

g. That as presently constituted the Board is unconstitutional;

all in violation of Appellants' legal and constitutional rights of due process which is more particularly set forth in the affidavit of Frederick E. Saefke, Jr., and accompanying exhibits, attached hereto and in support hereof.

2. As a remote alternative and as rather an absurd procedure, Appellants request, should the Court deny the foregoing motion, that the record be remanded to the State Banking Board under the direction of this Court that evidence pursuant to the

affidavit and exhibits attached hereto and in support hereof be received and made a part of the record in the matter before the State Banking Board.

Dated this 14th day of February, 1973.

/s/ FREDERICK E. SAEFKE, JR.
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APPENDIX C

In District Court
Fourth Judicial District

State of North Dakota
County of Burleigh

First American Bank & Trust Company, a Domestic Corporation, Robert M. Hart, Robert N. Campbell, Larry Sanders, Harvey W. Boen, Albert W. Fetzer, Ruth M. Hart, Bernard H. Hillyer, Arne J. Springan, John F. Sullivan, Charles L. Welch,

Appellants,

vs.

G. W. Ellwein, State Examiner and Commissioner, Department of Banking and Financial Institutions; the State Banking Board and Victor Abraham, Bank Examiner, All of the State of North Dakota,

Respondents.

Civil No. 22281.

Order

The motions of the appellant having come on for hearing before this court in the Burleigh County Courthouse, in Bismarck, North Dakota, on Thursday, the 22nd day of February, 1973, the Honorable M. C. Fredricks presiding, and Frederick E. Saefke, Jr. and Irvin B. Nodland, both of Bismarck, North

Dakota, appearing for the movants, and Frank F. Jestrab, Special Assistant Attorney General, 111 East Broadway, Williston, North Dakota, appearing for the respondents, and the court having examined the moving papers and the returns made is response thereto, and having heard the arguments of counsel, and having considered the matter, it is

ORDERED, that appel' nts' motion to permanently enjoin the State Banking Board, be and hereby is in all respects denied, and it is further

ORDERED that appellants' motion that the cause be remanded to the State Banking Board for the taking of additional evidence be and hereby is in all respects denied.

Dated this 29th day of February, 1973.

BY THE COURT:

M. C. FREDRICKS
District Judge

APPENDIX D

In District Court
Fourth Judicial District

State of North Dakota
County of Burleigh

First American Bank & Trust Company, a Domestic Corporation, Robert M. Hart, Robert N. Campbell, Larry Sanders, Harvey W. Boen, Albert W. Fetzer, Ruth M. Hart, Bernard H. Hillyer, Arne J. Springan, John F. Sullivan, Charles L. Welch,

Appellants,

vs.

Civil No. 22281

G. W. Ellwein, State Examiner and Commissioner Department of Banking and Financial Institutions; the State Banking Board and Victor Abraham, Bank Examiner, All of the State of North Dakota,

Respondents.

Return to Motion for Injunction

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Mr. Saefke's "absurd" request is that the record be remanded to the State Banking Board "under the directions of this court," that evidence pursuant to the affidavit and exhibits attached

thereto and in support thereof be received and made a part of the record. Mr. Saefke does not identify the evidence to which he refers. The exhibits annexed to the affidavit are:

1. Order and Findings of the State Banking Board dated December 11, 1972. These are before the court on appeal and are part of the record of the Board certified to this court by the State Examiner, Exhibit 1.

2. Extracts from the deposition of G. W. Ellwein dated July 20, 1972, marked as Exhibits 2 through 5 inclusive and Exhibit 8 on Mr. Saefke's affidavit.

3. A page of the complaint in a civil action pending in this court, filed long prior to the hearing before the State Banking Board, Exhibit 6.

4. Copies of affidavit of G. W. Ellwein, dated July 6, 1971, and January 12, 1972, Exhibit 7.

5. Affidavit of Earle H. Campbell, dated June 26, 1972, Exhibit 9.

6. Copies of minutes of the State Banking Board meeting of June 28, 1971 and January 17, 1972, Exhibit 10.

7. Copies of minutes of the State Banking Board's meeting of August 9, 1971, Exhibit 11.

8. Copies of minutes of State Banking Board meetings of November 13, 1972 and December 11, 1972, Exhibit 12.

We have no way of deciphering Mr. Saefke's somewhat turgid prose, but we think that he wants to make these exhibits a part of the record. This is only a guess but in the light of the "absurd" procedure, we can do nothing else.

The only statute under which additional evidence may be received in an administrative proceeding pending on appeal is Section 28-32-18 N.D.C.C. This section reads in part:

> ". . . If an application for leave to adduce additional evidence is made to the court in which an appeal from a determination of an administrative agency is pending, and it is shown to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing or proceeding had before the administrative agency, . . . the court may order that such additional evidence be taken, heard, and considered by such agency on such terms and conditions as the court may deem proper. . . ."
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> § 28-32-18 N.D.C.C.

We will assume, arguendo, that the proffered "evidence" is material. This leaves the question of whether the appellant had reasonable grounds for failure to adduce such evidence at the hearing. There is in the motion papers no grounds, reasonable or otherwise, given. Ergo, appellants have failed in their proof, and the motion must be denied.

Further, no reasonable grounds for such failure could exist. With the exception of Exhibit 12, that is the copies of the minutes of the State Banking Board's meeting held on November 13 and December 11, 1972, which we are willing to stipulate in the record, all of the exhibits were available to the respondents at the time of the hearing before the State Banking Board. During the hearing the respondents offered, and there were received, 55 exhibits more or less. The appellants produced and examined witnesses and cross-examined respondents' witnesses, and in addition to this, the record will clearly show, they conducted original examination of respondents' witnesses. The failure to introduce the "evidence" annexed to the affidavit

of Mr. Saefke, is without a reasonable excuse and the application must be denied.

This motion is the administrative law counterpart of a motion for a new trial under Rule 59(b) North Dakota Rules of Civil Procedure, upon the grounds of newly discovered evidence. The Supreme Court has reversed an order of a trial court granting a new trial upon the grounds of newly discovered evidence when such evidence could have been discovered by the exercise of reasonable diligence. *A fortiori,* it would be error to grant appellants' motion where such evidence was known to all concerned and in possession of appellants at the time of the hearing.

> "Where a movant for a new trial on the ground of newly discovered evidence knew the identity of an available witness under circumstances that pointed to the probability that the witness had knowledge of relevant facts which she refused to disclose until after trial, and the facts which she ultimately disclosed could have been discovered by disclosure proceedings under Rule 26, N.D.R.Civ.P., those facts do not constitute newly discovered evidence which could not with reasonable diligence have been discovered and produced at the trial."
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> *Erdahl v. Hegg,* 110 N.W.2d 355 (N.D. 1961).

Finally, with respect to the affidavit of Earle H. Campbell, dated June 26, 1972, and offered now to show bias on the part of Mr. Nicklawsky, a member of the State Banking Board, no excuse exists for failure to offer this exhibit and to object to Mr. Nicklawsky's presence on the Board at the time of the hearing. Mr. Saefke thought he would speculate the result of the hearing. If it turned out to be in his favor, he would not object. If, however, the result were adverse—he would produce the Campbell affidavit, Exhibit 9. This Mr. Saefke cannot do. In *State v. Clifford,* 65 Wash. 313, 118 P. 40 (1911), it was said:

"The statute upon which this application is based . . . is as follows: 'No judge . . . shall . . . try any action . . . when it shall be established . . . that such judge is prejudiced . . .'

". . . this objection should be made orderly and in time, to the end that there should be no undue interference with the administration of justice, while at the same time parties litigant should be protected against prejudiced judges . . .

". . . we cannot conclude that it was intended by the act that a party could submit to the jurisdiction of the court by waiving his rights to object until by some ruling of the court in a case he becomes fearful that the judge is not favorable to his view of the case. In other words, he is not allowed to speculate upon what rulings the court will make on propositions that are involved in the case, and, if the rulings do not happen to be in his favor, to then for the first time raise the jurisdictional question."

State v. Clifford, supra, at 41, 42.

In *In Re Union Leader Corporation*, 292 F.2d 381 (1st Cir. 1961), the court said:

". . .

". . . petitioner's claim . . . that in this case the judge's conduct 'fair[ly] supports' . . . its conclusion that bias exists. . . . Petitioner first points to the judge's statement on March 14 that petitioner is 'in the business of attacking me.' The obvious answer to this is that if petitioner did not find the judge disqualified in 1959 for that belief, he did not become so in 1961 because he continued to be of the same opinion. Nothing is more important in an affidavit than timeliness and its counterpart, waiver . . . The statute does not permit second guessing."

In Re Union Leader Corporation, supra, at 389, 390.

See also: *501 DeMers, Inc. v. Fink*, 148 N.W.2d 820 (N.D. 1967).

Dated this 20th day of February, 1973.

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